Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–168 OF 2008
RAMLY ALI, ALIZATUL KHAIR AND ANANTHAM KASINATHER JJCA
27 SEPTEMBER 2011

Civil Procedure — Declaration — Payment via banker's cheque valid payment by plaintiff for import duty to customs — Appeal against refusal of declaration — Whether banker's cheque wrongfully used by respondent — Whether payment occurred when banker's cheque in possession of Customs Department — Whether error could have been on the part of Customs Department — Customs Department not made party to proceedings — Whether trial judge erred in dismissing appellant's declaratory application merely on grounds that Customs Department not made a party — Customs Department admitted that appellant's banker's cheque was wrongfully used by respondent — Whether evidence established justified granting of declaration prayed for

Customs and Excise — Customs duties — Payment of — Declaration that payment via banker's cheque valid payment by appellant for import duty to customs — Appeal against refusal of declaration — Whether banker's cheque wrongfully used by respondent — Whether payment occurred when banker's cheque in possession of Customs Department — Whether error on the part of Customs Department — Whether appellant proved that banker's cheque belonging to them was wrongfully used by respondent to pay its own customer's duties — Whether trial judge failed to appreciate and give due weight or failed to make correct inference based on evidence adduced

Restitution — Banker's cheque — Deposited into customs account — Wrongful usage of banker's cheque — Whether respondent wrongfully used appellant's banker's cheque — Whether respondent obtained material advantage by said use — Determining unjust enrichment — Factors considered — Whether continued retention of benefit by respondent totally unjust

The appellant had made a declaration to the Pengarah Kastam Negeri Subang via Customs K1 Form No W11103021323 of its customer's consignment. The import duty payable for the consignment was RM93,813.24. The appellant had instructed its bank, Malayan Banking Bhd ('MBB') to issue a banker's cheque payable to 'Pengarah Kastam Negeri Subang'. MBB issued the said

banker's cheque bearing No 213709 for the sum of RM93,813.24, being the amount of the import duty due to the customs. The payment was proved by an endorsement on the said Form K1. The appellant was then allowed to take out the consignment since the duty was paid and had delivered the consignment to its customer. Nearly a year later, the appellant was informed by the customs preventive officer ('PW2') that the import duty payable on the appellant's Form K1 had not been paid as yet. The investigation by the appellant revealed that the said banker's cheque had been wrongfully used by the respondent — who was also involved in a similar business such as the appellant — to pay for its customer's consignment import duties. The appellant commenced an action against the respondent to obtain, inter alia, a declaration that the payment via banker's cheque number 213709 amounting to RM93,813.24 was a valid payment by the appellant for import and sales tax duty for Customs Form K1 W11103021323. In the statement of defence, the respondent pleaded, inter alia, that the respondent had no knowledge of the appellant's banker cheque and/or the other documents referred to in the appellant's statement of claim and put the appellant to strict proof thereof. The respondent also pleaded in the alternative that even if the appellant's banker's cheque was used by its worker or agent, the appellant did not state the name of the worker or agent or to the time and place of the alleged wrongful act. After a full trial, the learned High Court judge dismissed the appellant's claim without an order as to costs. In the present appeal before the court, the appellant contended that by the fact of the endorsement at the back of the appellant's banker's cheque, the appellant had discharged the heavy burden upon it of proving that the respondent had wrongfully used the appellant's said banker's cheque to pay for the customs duties payable by the respondent on behalf of its customer. In dismissing the appellant's claim without an order as to costs, the learned High Court judge stated, inter alia, that since the appellant obtained customs clearance on 30 March 1998, the appellant's banker's cheque must have been with the customs department, and if applied to payments on other accounts on 27 April 1998, it could only occur when the appellant's banker's cheque was with the customs department. It was further held that although the respondent appeared to have benefited from the appellant's banker's cheque, the question remains open whether the wrongful use was by the respondent or the customs department. Further, the learned judge refused to make any order against the customs department on the ground that the latter had not been made a party and it had no opportunity to defend itself against any order that might be made against it.

Held, allowing the appeal with costs:

(1) The appellant had discharged its burden of proof by proving that the respondent had wrongfully used the appellant's banker's cheque knowingly, and the respondent had clearly obtained a material advantage

by the said use of the appellant's banker's cheque. The issue as to how the respondent obtained the said banker's cheque was irrelevant to the issues to be considered (see para 16).

(2) The learned judge had made a wrong finding in dismissing the appellant's declaratory application merely on the grounds that the customs department was not made a party to the proceedings. The learned judge should have granted the declaration particularly when there was evidence to show that PW2, an officer of the customs department, admitted in his testimony that the appellant's said banker's cheque was wrongfully used by a third party and the said third party was the respondent (see paras 19–21).

(3) Even the learned judge in his grounds of judgment had concluded that the appellant had made the payment on the customs duty in question to the amount of RM93,813.24; the error was in the Customs Department; the respondent had not shown it has itself paid the amount of its duties; and the respondent had benefited from the appellant's banker's cheque. To refuse such a declaratory relief to the appellant in the circumstances of the case, was clearly unjust and inappropriate (see para 21).

(4) The customs department would not be caught by surprise if the order for rectification is granted. The department was aware of the matter right before the appellant filed its claim in court; they had done their own internal investigation, led by PW2; and concluded that the said banker's cheque in question was wrongfully used by a third party. What the department needed was a valid court order for rectification of the records made by the court based on the whole evidence adduced in court, where it was proven that the said third party refers to the respondent (see para 22).

(5) The facts and circumstances of the present case clearly point in favour of the appellant for the alternative order prayed for ie for damages or restitution of the amount relating the wrongful usage of the appellant's banker's cheque. Restitution means to cause the restoration of a thing, the enrichment or benefit or its money's worth received by the respondent from the wrongful usage of the appellant's banker's cheque, at the expense of the appellant (see para 24).

[Bahasa Malaysia summary

Perayu telah membuat deklarasi kepada Pengarah Kastam Negeri Subang melalui Borang Kastam K1 No W11103021323 konsainan pelanggannya. Duti import yang dibayar untuk konsainan adalah RM93,813,24. Perayu telah mengarahkan bank, Malayan Banking Bhd ('MBB') untuk mengeluarkan cek bank kepada 'Pengarah Kastam Negeri Subang'. MBB mengeluarkan cek bank bernombor 213709 untuk jumlah sebanyak RM93,813,24, iaitu jumlah duti import yang sewajarnya kepada kastam. Pembayaran telah dibuktikan oleh

pengendorsan pada Borang K1 tersebut. Perayu kemudian dibenarkan untuk mengambil konsainan kerana duti telah dibayar dan telah konsainan telah disampaikan kepada pelanggan. Hampir setahun kemudian, perayu telah diberitahu oleh pegawai pencegah kastam ('PW2') bahawa duti import yang dibayar pada Borang K1 perayu belum lagi dibayar. Penyiasatan oleh perayu mendedahkan bahawa cek bank tersebut telah secara disalahgunakan oleh responden — yang juga terlibat dalam perniagaan yang sama seperti perayu — untuk membayar duti import konsainan pelanggan. Perayu telah memulakan suatu tindakan terhadap responden untuk mendapatkan, antara lain, deklarasi bahawa pembayaran melalui nombor cek bank 213709 berjumlah RM93,813,24 adalah pembayaran yang sah oleh perayu untuk jualan import dan duti cukai bagi Borang Kastam K1 W11103021323. Dalam penyataan pembelaannya, responden memplidkan, antara lain, bahawa responden tidak mempunyai pengetahuan cek bank perayu dan/atau dokumen-dokumen lain yang disebut dalam kenyataan perayu tuntutan dan meletakkan pembuktian keras ke atas perayu. Responden juga memplidkan secara alternatif bahawa walaupun cek bank perayu tersebut telah digunakan oleh pekerja atau ejen, perayu tidak menyatakan nama pekerja atau ejen atau masa dan tempat perbuatan salah yang didakwa. Selepas perbicaraan penuh, yang arif Hakim mahkamah Tinggi menolak tuntutan perayu tanpa suatu perintah untuk kos. Dalam rayuan di hadapan mahkamah, perayu menghujahkan bahawa dengan pengesahan fakta di bahagian belakang cek bank perayu, perayu telah melepaskan beban berat untuk membuktikan bahawa responden telah secara salah menggunakan cek bank untuk membayar duti kastam yang perlu dibayar oleh responden bagi pihak pelanggan. Dalam menolak tuntutan perayu tanpa suatu perintah tentang kos, yang arif Hakim mahkamah Tinggi menyatakan antara lain, bahawa oleh kerana perayu mendapat pelepasan kastam pada 30 Mac 1998, cek bank perayu sepatutnya berada dengan Jabatan Kastam, dan jika terpakai kepada bayaran akaun lain pada 27 April 1998, ia hanya boleh berlaku apabila cek bank perayu berada dengan Jabatan Kastam. Diputuskan selanjutnya bahawa walaupun responden kelihatan seperti telah mendapat manfaat daripada cek bank perayu, persoalan masih terbuka sama ada penggunaan secara salah adalah oleh responden atau Jabatan Kastam. Selanjutnya, hakim enggan membuat apa-apa perintah terhadap Jabatan Kastam atas alasan bahawa mereka tidak dijadikan sebagai pihak dan ia tidak mempunyai peluang untuk membela daripada mana-mana perintah yang mungkin dibuat terhadapnya.

Diputuskan, membenarkan rayuan dengan kos:

(1) Perayu telah melepaskan beban bukti dengan membuktikan bahawa responden telah menggunakan cek bank perayu secara salah dengan disedarinya, dan responden telah jelas mendapat kelebihan material melalui penggunaan cek bank perayu tersebut. Isu tentang bagaimana

responden memperolehi cek bank tersebut adalah tidak relevan kepada isu-isu yang perlu dipertimbangkan (lihat perenggan 16).

(2) Yang arif hakim telah membuat suatu keputusan yang salah dalam menolak permohonan deklarasi perayu semata-mata atas alasan bahawa Jabatan Kastam tidak dijadikan pihak kepada prosiding tersebut. Yang arif hakim seharusnya memberikan deklarasi tersebut terutamanya apabila terdapat bukti untuk menunjukkan bahawa PW2, Pegawai Jabatan Kastam, mengaku dalam keterangannya bahawa cek bank perayu telah disalahgunakan oleh suatu pihak ketiga dan yang pihak ketiga yang dikatakan tersebut adalah responden (lihat perenggan 19–21).

(3) Yang Arif hakim juga dalam dalam alasan penghakiman beliau telah memutuskan bahawa perayu telah membuat pembayaran duti kastam yang berkenaan berjumlah sebanyak RM93,813.24; kesilapan tersebut adalah di Jabatan Kastam; responden tidak menunjukkan ia secara sendirinya telah membayar jumlah-jumlah duti; dan responden telah mendapat manfaat dari cek bank perayu. Untuk menafikan perayu daripada deklarasi relief dalam hal keadaan kes itu, adalah jelas tidak adil dan tidak bersesuaian (lihat perenggan 21).

(4) Jabatan kastam tidak akan hairan jika perintah bagi pembetulan diberikan. Jabatan mengenai sedar perkara tersebut sejurus sebelum perayu memfailkan tuntutan di mahkamah; mereka telah melakukan siasatan dalaman mereka sendiri, yang diketuai oleh PW2 dan membuat kesimpulan bahawa cek bank tersebut telah disalahgunakan oleh pihak ketiga. Apa yang diperlukan oleh jabatan adalah perintah mahkamah yang sah bagi pembetulan rekod yang dibuat oleh mahkamah berdasarkan bukti yang dikemukakan di mahkamah, di mana telah terbukti bahawa pihak ketiga yang tersebut merujuk kepada responden (lihat perenggan 22).

(5) Fakta-fakta dan hal keadaan kes ini jelas memihak kepada perayu untuk mendapatkan perintah alternatif yang dipohon iaitu bagi ganti rugi atau restitusi jumlah bagi penyalahgunaan cek bank perayu. Restitusi bermakna menyebabkan pengembalian sesuatu, pengayaan atau faedah atau nilai wang yang diterima oleh responden daripada penyalahgunaan cek bank perayu, atas perbelanjaan perayu (lihat perenggan 24).]

Notes

For cases on declaration in general, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2516–2585.

Cases referred to

Chu Choon Moi v Ngan Sew Tin [1986] 1 MLJ 34; [1985] 1 LNS 134, SC (refd)

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697; [1992] 1 CLJ (Rep) 72, SC (refd)

Ikebife Ibeneweka & Ors v Peter Egbuna & Anor [1964] 1 WLR 219, PC (refd)

Magnum Finance Bhd v Tan Ah Poi & Anor [1996] MLJU 538; [1997] 4 CLJ Supp 44, HC (refd)

PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136, FC (refd)

Sediperak Sdn Bhd v Baboo Chowdury [1999] 5 MLJ 229; [1999] 5 CLJ 31, HC (refd)

Legislation referred to

Contracts Act 1950 s 71

Appeal from: Civil Suit No D4–22–882 of 2003 (High Court, Kuala Lumpur)

R Subitra Dali (Surend Mokhzani & Partners) for the appellant.
Zulkifli Omar (Azmer Saad with him) (Lainah Yaacob & Zulkepli) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

[1] This is an appeal by the plaintiff/appellant against the decision of the High Court in dismissing its claim with no order as to costs.

THE APPELLANT'S CLAIM

[2] The appellant, Air Express International (M) Sdn Bhd, at all material times was a company involved in a business of delivering consignment and customs' clearance for its customers. On or about 26 March 1998, the appellant had made a declaration to the Pengarah Kastam Negeri Subang via Customs K1 Form No W11103021323 of its customer's consignment. The import duty payable for the consignment was RM93,813.24.

[3] On or about 30 March 1998, the appellant had instructed its bank, Malayan Banking Bhd ('MBB') to issue a banker's cheque payable to 'Pengarah Kastam Negeri Subang'. MBB issued the said banker's cheque bearing No 213709 for the sum of RM93,813.24, being the amount of the import duty due to the customs. The payment was proved by an endorsement on the said Form K1. The appellant was then allowed to take out the consignment since the duty was paid on 30 March 1998 and had delivered the consignment to its customer.

[4] Nearly a year later (on 16 March 1999) the appellant was informed by the customs preventive officer ('PW2') that the import duty payable on the appellant's Form K1 had not been paid yet.

[5] Initial investigation, revealed that the appellant's banker's cheque dated 30 March 1998 for the sum of RM93,813.24 was deposited into the customs RHB's ('RHB Bank Bhd') Account No 014118157214. Upon further investigation the appellant alleged that the said banker's cheque had been wrongfully used by the respondent to pay for its customer's consignment import duties. The appellant's investigation also revealed that the respondent was also involved in a similar business such as the appellant and at the material time the respondent's customer was Tenaga Nasional Bhd ('TNB').

[6] The appellant commenced the present action at the Kuala Lumpur High Court against the respondent for the following orders:

(a) a declaration that the said payment vide the appellant's banker's cheque for the sum of RM93,813,24 dated 30 March 1998 was a valid payment by the appellant for the import and sales tax duty for Customs Form K1 W11103021323 dated 26 March 1998;

(b) in the alternative, the respondent is to pay to the appellant a sum of RM93,813.24 as damages for the usage of the appellant's banker's cheque;

(c) that the customs does the necessary rectification to the consignment duty by crediting the sum of RM93,813.24 to reflect that Customs Form K1 W11103021323 dated 26 March 1998 has been paid by the appellant vide the appellant's banker's cheque;

(d) costs to be borne by the respondent and paid to the appellant;

(e) general damages to be taxed; and

(f) any other order and/or relief as deemed fit by the High Court.

THE RESPONDENT'S DEFENCE

[7] In the statement of defence, the respondent pleaded, inter alia, that the respondent had no knowledge of the appellant's banker cheque and/or the other documents referred to in the appellant's statement of claim and put the appellant to strict proof thereof. The respondent also pleaded in the alternative that even if the appellant's banker's cheque was used by its worker or agent, the appellant did not state the name of the worker or agent or to the time and place of the alleged wrongful act. The respondent pleaded that the appellant's claim be dismissed with costs.

[8] On 20 March 2007, the learned High Court judge dismissed the appellant's claim without an order as to costs, after full trial. Hence the present appeal before us.

THE APPELLANT'S REPLY

[9] In its reply, the appellant contended that there was an endorsement at the back of the appellant's banker's cheque which showed that it was used by the respondent's staff or agent by name, Azim (with identity card No A2594305) and that the receipt numbers endorsed at the back of the said banker's cheque corresponded with the receipts printed on the respondent's Customs Form K1.

[10] The appellant argued that by the fact of the endorsement of receipt numbers on the back of the said banker's cheque, the appellant had discharged the heavy burden upon it of proving that the respondent had wrongfully used the appellant's said banker's cheque to pay for the customs duties payable by the respondent on behalf of its customer, TNB.

THE HIGH COURT JUDGE'S GROUNDS OF DECISION

[11] In dismissing the appellant's claim without an order as to costs, the learned High Court judge gave the following reasons:

(a) since the appellant obtained customs clearance on 30 March 1998, the appellant's banker's cheque must have been with the Customs Department, and if applied to payments on other accounts on 27 April 1998, it could only occur when the appellant's banker's cheque is with the Customs Department;

(b) although the respondent appears to have benefited from the appellant's banker's cheque, the question remains open whether the wrongful use was by the respondent or the Customs Department. It is at least probable the error was in the Customs Department, in which case there is no ground to make orders at the appellant's instance. Although the appellant's prayers had also sought orders against the Customs Department, the Customs Department had not been made a party and the latter had not had the opportunity to defend itself against any order that might be made against it. No order may be made against the Customs Department also; and

(c) since the respondent benefited from the appellant's bankers cheque and since in these circumstances it had not shown it has itself paid, the court will not make an order of costs in its favour. There is, therefore, no order as to costs.

A FINDINGS OF THIS COURT

[12] In his judgment the learned judge found, that the application of the appellant's banker's cheque to payments on other account ie the respondent's account could only occur when the said banker's cheque was in the hand of the Customs Department, particularly after the appellant had obtained customs clearance on its consignment on 30 March 1998. The learned judge went on to find that 'it is at least probable the error was in the Customs Department'. The learned judge refused to make any order against the Customs Department on the ground that 'the Customs Department had not been made a party and it had no opportunity to defend itself against any order that might be made against it'.

[13] Learned judge failed to appreciate and to give due weight or failed to make the correct inference based on the evidence adduced before the court. There are sufficient evidence to show that the appellant had declared to the Customs Department in respect of its own customer's consignment vide customs Form K1, which totals to the sum of RM93,813.24; that the appellant had paid the said duties by MBB Banker's cheque No 213709 for the same amount; that the respondent had declared to the customs in respect of its own customer's consignment vide 6 Form K1, of which total to the sum of RM93,809.86; that on the reverse side of the appellant's bankers cheque, there is a range of receipt numbers printed which are the same numbers printed on the respondent's Form K1; that the 'Rekod Kutipan Hasil Juruwang' for the relevant dates shows that a sum of RM3.38 (being the difference between the amount in the appellant's banker's cheque and total amount of the import duties declared by the respondent in its Form K1) was returned to the respondent by the Customs Department; and that PW2's oral testimony wherein he admitted that based on his departmental investigation into the matter the appellant's banker's cheque was used by a third party (PW2 is Encik Saleh A Majid, the customs prevention officer in charge of the investigation related to this matter).

[14] Although on one hand the learned judge in his judgment (at paras 15–17 pp 32–33 of the appeal records) had accepted the appellant's evidence, yet on the other hand (at para 18, p 34 of the appeal records) he stated that there was no evidence before the court as to how the respondent obtained the said banke's cheque and went on to dismiss the appellant's claim against the respondent.

[15] At p 34, para 20 of the appeal records, the learned judge also dismissed the respondent's evidence that its customer's import duties were in fact paid by its own banker's cheques on the ground that there was no corresponding

banker's cheques shown, nor was there any evidence shown whether those cheques were in fact credited into the customs accounts.

[16] On the balance of probabilities and on the totality of the whole evidence before the court, we are satisfied that the appellant has proven and discharged its burden of proof that the appellant has paid the import duty to the customs and on that basis the consignment was released and delivered to the appellant's customers. The appellant had also, on the balance of probabilities, proved that the said banker's cheque belonging to the appellant was wrongfully used by the respondent to pay its own customer's duties. The oral testimony of SDI, Mohd Azim Ishak, particularly during his cross-examination, has failed to rebut the apellant's case on the balance of probabilities on this issue. This in itself is a wrongful act on the part of the respondent. The issue as to how the respondent obtained the said banker's cheque is, to our mind, irrelevant to the issues to be considered. The appellant has discharged its burden of proof and proved that the respondent had wrongfully used the appellant's banker's cheque knowingly, and the respondent had clearly obtained a material advantage by the said use of the appellant's banker's cheque, (see *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136; *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34; [1985] 1 LNS 134 and *Magnum Finance Bhd v Tan Ah Poi & Anor* [1996] MLJU 538; [1997] 4 CLJ Supp 44).

[17] The first prayer (prayer a) in the appellant's statement of claim, prays for a declaratory order — a declaration that the said payment vide the appellant's banker's cheque for the sum of RM93,813.24 dated 30 March 1998 was a valid payment by the appellant for the import and sales tax duty for Customs Form K1 W-11103021323 dated 26 March 1998.

[18] PW2 — Encik Saleh A Majid, the customs preventive officer in charge of the investigation related to this matter agreed and admitted that based on his investigations the said appellant's banker's cheque was used by the third party. There was sufficient evidence to prove that the said 'third party' refers to the respondent.

[19] We are of the view that the learned judge had made a wrong finding in dismissing the appellant's declaratory application merely on the grounds that the Customs Department was not made a party to the proceedings. Viscount Radcliffe in *Ikebife Ibeneweka & Ors v Peter Egbuna & Anor* [1964] 1 WLR 219 at p 226 ruled:

A However that may be, there has never been any unqualified rule of practice that forbids the making of a declaration even when some of the persons interested in the subject of the declaration are not before the court.

B **[20]** The above principle was adopted and followed by the Supreme Court in *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697,; [1992] 1 CLJ 72 (Rep),; [1992] 2 CLJ 1125.

C **[21]** In this case, the learned judge should have granted the declaration prayed for particularly when there are evidence to show that PW2, being an officer of the Customs Department in charge of the investigation relating to this matter appeared in court and admitted in his testimony that the appellant's said banker's cheque was wrongfully used by a third party and the said third party was the respondent. Even the learned judge in his grounds of judgment had concluded that the appellant had made the payment on the customs duty in question to the amount of RM93,813.24; the error was in the Customs Department; the respondent had not shown it has itself paid the amount of its duties; and the respondent had benefited from the appellant's banker's cheque. To refuse such a declaratory relief to the appellant in the circumstances of the case, is clearly unjust and inappropriate.

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F **[22]** That being the case, we are also of the view that there are no legal impediment for the court to grant the appellant in respect of its prayer (c) ie to order the Customs Department to do the necessary rectification to the consignment duty by crediting the sum of RM93,813.24 to reflect that the Customs Form K1 W-11103021323 dated has been paid by the appellant vide the appellant's banker's cheque. The Customs Department would not be caught by surprise if the order for rectification is granted. The department was aware of the matter right before the appellant filed its claim in court; they had done their own internal investigation, led by PW2; and concluded that the said banker's cheque in question was wrongfully used by a third party. What the department need was a valid court order for rectification of the records made by the court based on the whole evidence adduced in court, where it was proven that the said third party refers to the respondent.

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H **[23]** Alternatively, the learned judge could also grant the alternative remedy prayed for by the appellant in prayer (b) of the claim ie the respondent is to pay to the appellant a sum of RM93,813.24 for damages for the wrongful usage of the appellant's banker's cheque.

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[24] The appellant stood on solid ground for the claim made as the facts and circumstances of the present case clearly point in its favour for the alternative order prayed for ie for damages or restitution of the amount relating the wrongful usage the appellant's banker's cheque. Restitution means to cause the restoration of a thing, the enrichment or benefit or its money's worth received by the respondent from the wrongful usage of the appellant's banker's cheque, at the expense of the appellant. To determine unjust enrichment, either in relation to s 71 of the Contracts Act 1950 or the common law, the appellant in this appeal must satisfy the following three enquires:

(a) that the respondent was enriched by receiving a benefit;

(b) that the benefit received was at the appellant's expense; and

(c) that the retention of the benefit by the respondent was unjust.

(See *Sediperak Sdn Bhd v Baboo Chowdury* [1999] 5 MLJ 229; [1999] 5 CLJ 31).

[25] In the present case, the evidence adduced as well as the grounds of judgment of the learned judge clearly indicate the respondent was enriched by receiving the benefit of the value of the appellant's banker's cheque. The evidence also show that the said banker's cheque was wrongfully used by the respondent to pay for its customer's customs duties and as found by the learned judge 'the respondent benefited from the appellant's banker's cheque and … it had not shown it has itself paid' the customs duties. Of course the enjoyment of the benefit of the banker's cheque by the respondent was at the expense of the appellant. On the facts and circumstances of the present case, the continued retention of the benefit by the respondent is totally unjust.

CONCLUSION

[26] Based on the above considerations, and on the totality of the evidence adduced before the trial court, we are of the view that the learned judge's decision to disallow the appellant's claim was not in line with the evidence adduced. There was ample evidence, on the balance of probabilities to establish the appellant claim against the respondent.

[27] We therefore allow the appeal with costs of RM10,000 to the appellant and make an order that the deposit to be refunded to the appellant.

A *Appeal allowed with costs.*

Reported by Ashgar Ali Ali Mohamed

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